



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Parts 207 and 326

RIN 0710-AB19

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is issuing this final rule to adjust its civil monetary penalties (CMP) under the Rivers and Harbors Act of 1922 (RHA), the Clean Water Act (CWA), and the National Fishing Enhancement Act (NFEA) to account for inflation.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For the RHA portion, please contact Mr. Paul Clouse at 202-761-4709 or by e-mail at Paul.D.Clouse@usace.army.mil, or for the CWA and NFEA portion, please contact Ms. Karen Mulligan at 202-761-4664 or by e-mail at karen.mulligan@usace.army.mil or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>

SUPPLEMENTARY INFORMATION:

The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 104 Stat. 890 (28 U.S.C. 2461, note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, April 26, 1996, and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act), Public Law 114-74, November 2, 2015, required agencies to annually adjust the level of CMP for inflation to improve their effectiveness and maintain their deterrent effect.

With this rule, the new statutory maximum penalty levels listed in Table 1 will apply to all statutory civil penalties assessed on or after the effective date of this rule. Table 1 shows the calculation of the 2021 annual inflation adjustment based on the guidance provided by the Office of Management and Budget (OMB) (see December 23, 2020, Memorandum for the Heads of Executive Departments and Agencies, Subject: Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act 2015). The OMB provided to agencies the cost-of-living adjustment multiplier for 2021, based on the Consumer Price Index for All Urban Consumers (CPI-U) for the month of October 2020, not seasonally adjusted, which is 1.01182. Agencies are to adjust “the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.” For 2021, agencies multiply each applicable penalty by the multiplier, 1.01182, and round to the nearest dollar. The multiplier should be applied to the most recent penalty amount, i.e., the one that includes the 2020 annual inflation adjustment.

TABLE 1

Citation	Civil Monetary Penalty (CMP) Amount established by law	2020 CMP Amount in effect prior to this rulemaking	2021 Inflation Adjustment Multiplier	CMP Amount as of [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]
Rivers and Harbors Act of 1922 (33 U.S.C. 555)	\$2,500 per violation	\$5,834 per violation	1.01182	\$5,903 per violation
CWA, 33 U.S.C. 1319(g)(2)(A)	\$10,000 per violation, with a maximum of \$25,000	\$22,321 per violation, with a maximum of \$55,801	1.01182	\$22,585 per violation, with a maximum of \$56,461
CWA, 33 U.S.C. 1344(s)(4)	Maximum of \$25,000 per day for each violation	Maximum of \$55,801 per day for each violation	1.01182	Maximum of \$56,461 per day for each violation
National Fishing Enhancement Act, 33 U.S.C. 2104(e)	Maximum of \$10,000 per violation	Maximum of \$24,441 per violation	1.01182	Maximum of \$24,730 per violation

Section 4 of the Inflation Adjustment Act directs federal agencies to publish annual penalty inflation adjustments. In accordance with Section 553 of the Administrative Procedures Act (APA), most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the Federal Register. Section 4(b)(2) of the Inflation Adjustment Act further provides that each agency shall make the annual inflation adjustments “notwithstanding

section 553” of the APA. According to the December 2020 OMB guidance issued to Federal agencies on the implementation of the 2021 annual adjustment, the phrase “notwithstanding section 553” means that “the public procedure the APA generally requires (*i.e.*, notice, an opportunity for comment, and a delay in effective date) is not required for agencies to issue regulations implementing the annual adjustment.” Consistent with the language of the Inflation Adjustment Act and OMB’s implementation guidance, this rule is not subject to notice and opportunity for public comment. This rule adjusts the value of current statutory civil penalties to reflect and keep pace with the levels originally set by Congress when the statutes were enacted, as required by the Inflation Adjustment Act. This rule will apply prospectively to penalty assessments beginning on the effective date of this final rule.

Regulatory Procedures

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, regarding plain language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps and the use of “you” refers to the reader. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review”

This rule is not designated a “significant regulatory action” under Executive Order 12866 and OMB determined this rule to not be significant. Moreover, this final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the Inflation Adjustment Act and OMB guidance. The Corps, therefore, did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

The Department of Defense determined that provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements. This action merely increases the level of statutory civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of Corps-administered statutes and their implementing regulations.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Unfunded Mandates Reform Act (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule the mandates of which require spending in any year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 104-113, “National Technology Transfer and Advancement Act” (15 U.S.C. Chapter 7)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, (15 U.S.C. 272 note), directs us to use voluntary consensus

standards in our regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks”

Executive Order 13045 applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives. This rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have tribal implications. The rule imposes no new substantive obligations on tribal governments. Therefore, Executive Order 13175 does not apply to this rule.

Public Law 104-121, “Congressional Review Act”, (5 U.S.C Chapter 8)

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin. This rule merely adjusts civil penalties to account for inflation, and therefore, is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

This rule is not a “significant energy action” as defined in Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

33 CFR Part 207

Navigation (water), Penalties, Reporting and recordkeeping requirements, and Waterways.

33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations, Investigations, Law enforcement, Navigation (Water), Water pollution control, Waterways.

Dated: July 6, 2021. Approved by: _____

Jaime A. Pinkham

Acting Assistant Secretary of the Army

(Civil Works)

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 207—NAVIGATION REGULATIONS

1. The authority citation for part 207 is revised to read as follows:

Authority: 33 U.S.C. 1; 33 U.S.C. 555; 28 U.S.C. 2461 note.

2. Amend § 207.800 by revising paragraph (c)(2) to read as follows:

§ 207.800 Collection of navigation statistics.

* * * *

(c) * *

(2) In addition, any person or entity that fails to provide timely, accurate, and complete statements or reports required to be submitted by the regulation in this section may also be assessed a civil penalty of up to \$5,903 per violation under 33 U.S.C. 555, as amended.

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PART 326--ENFORCEMENT

3. The authority citation for part 326 continues to read as follows:

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2104; 33 U.S.C. 1319; 28 U.S.C. 2461 note.

4. Amend § 326.6 by revising paragraph (a)(1) to read as follows:

§ 326.6 Class I administrative penalties.

(a) * * *

(1) This section sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act, judicially-imposed civil penalties under Section 404(s) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. Under Section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed \$22,585 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$56,461. Under Section 404(s)(4) of the Clean Water Act, judicially-imposed civil penalties may not exceed \$56,461 per day for each violation. Under Section 205(e) of the National Fishing Enhancement Act, penalties for violations of permits issued in accordance with that Act shall not exceed \$24,730 for each violation.

Table 1 to paragraph (a)(1)

Environmental Statute and U.S. Code Citation	Statutory Civil Monetary Penalty Amount for violations that occurred after November 2, 2015, and are assessed on or after
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	[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]
Clean Water Act (CWA), Section 309(g)(2)(A), 33 U.S.C. 1319(g)(2)(A)	\$22,585 per violation, with a maximum of \$56,461
CWA, Section 404(s)(4), 33 U.S.C. 1344(s)(4)	Maximum of \$56,461 per day for each violation
National Fishing Enhancement Act, Section 205(e), 33 U.S.C. 2104(e)	Maximum of \$24,730 per violation

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[FR Doc. 2021-14716 Filed: 7/14/2021 8:45 am; Publication Date: 7/15/2021]